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HAROLD B. WILLEY, C

Supreme Court of the United States

October Term, 1954

No. 747

IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,

Petitioner,

against

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

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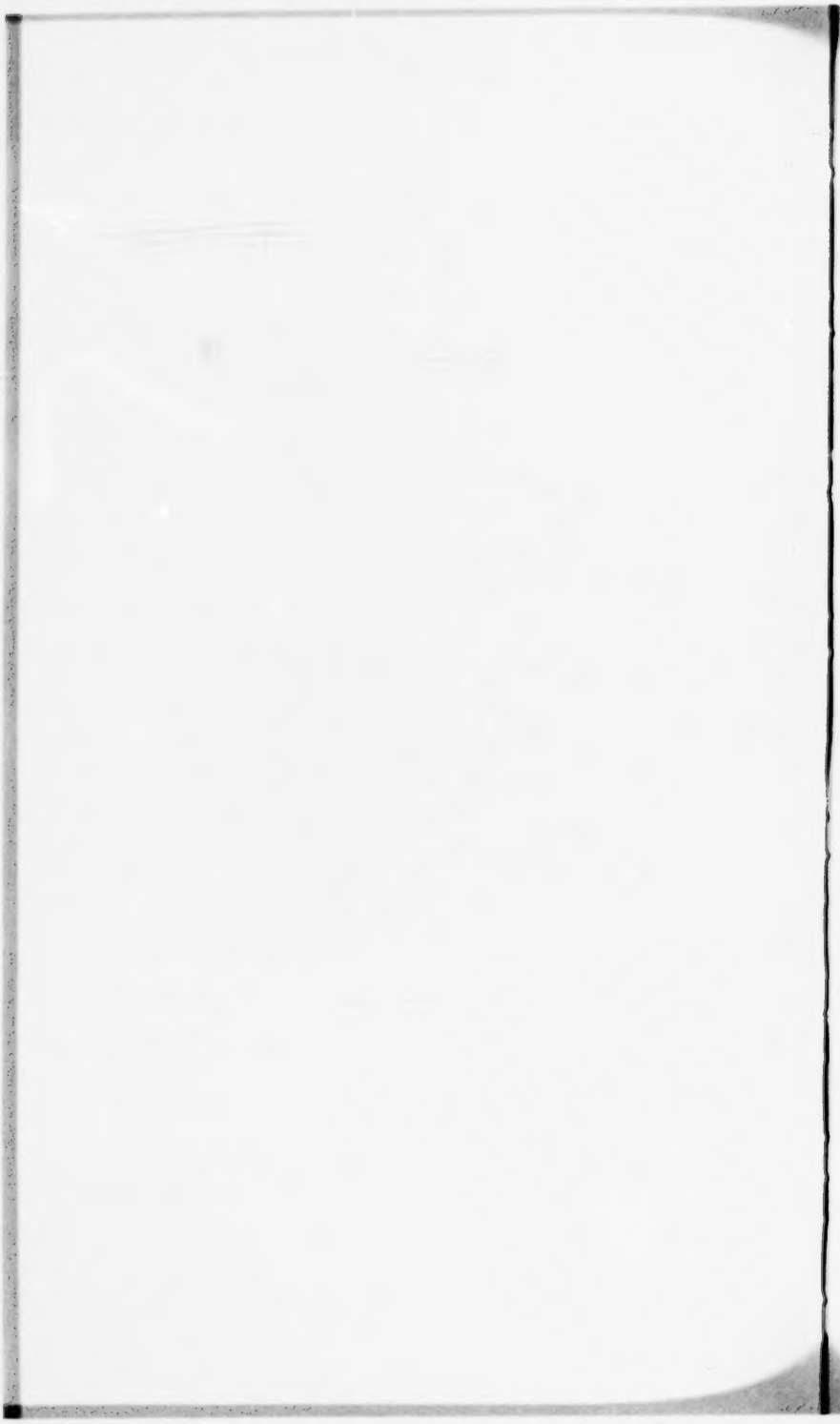

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No.

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PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

To the Honorable Chief Justice and Associate Justices of the Supreme Court of the United States:

Petitioner, Irene L. Fairbairn, as Administratrix of the goods, chattels and credits of Robert L. Fairbairn, deceased, prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Second Circuit, entered in the above entitled action on the 25th day of January, 1955.

Jurisdiction

Jurisdiction to review this action is based on 28 U. S. C. § 1254(1). The opinion below was filed on the 25th day of January, 1955.

Opinion Below

The opinion of the United States Court of Appeals for the Second Circuit (No. 136—October Term, 1954); is officially reported in 218 F. (2d) 602.

The Decision Below

This action for damages for the wrongful death of Robert L. Fairbairn, Master of the S.S. ANDREW MOORE, on September 17, 1947, was predicated upon the provisions of the Jones Act, 46 U. S. C. § 688, and was instituted on March 27, 1950.

On January 12, 1954, the action came on for trial by jury before the Hon. Edward Weinfeld. During the course of said trial plaintiff attempted to place into evidence an illness report signed by chief mate Harry B. Hansen, who became the acting master of the vessel when the deceased Robert L. Fairbairn was first stricken by his fatal attack. The illness report was, in effect, the basis of plaintiff's action for defendant's failure to render prompt, adequate and proper treatment to the deceased from the first moment of the said attack to the time of his death some three hours later. As a result of the failure of an employee of the defendant to identify the said illness report, the plaintiff moved for, and was granted, a mistrial upon conditions which were complied with by plaintiff's counsel.

The action was then returned to the trial calendar for trial on May 21, 1954, was subsequently adjourned and set down for trial on June 1, 1954, before the Hon. John F. X. McGohey.

On May 26, 1954, pursuant to notice to the defendant, plaintiff made application returnable before the Hon. John C. Knox for an adjournment of the action until the Fall

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of 1954 by reason of the fact that the said Harry B. Hansen, who signed the said illness report, which was the basis and cornerstone of plaintiff's claim against said defendant, was at sea and would not be available as plaintiff's witness for the trial. Plaintiff's application was denied.

Trial by jury of the action commenced on June 1, 1954, before the Hon. John F. X. McGohey, a verdict being rendered for the defendant and judgment entered thereon June 7, 1954.

Petitioner duly appealed to the United States Court of Appeals for the Second Circuit, which Court, on the 25th day of January, 1955, affirmed the judgment of the Trial Court.

Reasons for Granting the Writ

The provisions of Amendments V and VII of the Constitution of the United States, holding that "No person shall be * * * deprived of * * * property, without due process of law" and preserving "the right of trial by jury" would appear to have been denied to petitioner herein.

Petitioner's application for adjournment on May 26, 1954, was supported by affidavits by Jacob Rassner, petitioner's counsel, and by oral argument before Hon. John C. Knox.

The Court, by its refusal to grant said adjournment, denied petitioner her constitutional rights:

a) in not adjourning the action until such time as an examination before trial of defendant could be taken, long after due notice.

b) by directing the action to trial in absence of testimony of the witness, Harry B. Hansen, acting Master in place of decedent, upon decedent's death.

The decision resolved about whether a report made by Hansen was correct and was later deliberately substituted by defendant-respondent for a second report.

Said first report had correctly stated a complete failure to treat the deceased, Master of a vessel, during an entire period of 2 hours, 55 minutes.

A second report was then filed, absolving defendant-respondent from liability. Both reports are annexed hereto and made part hereof (printed at pages 7 to 11).

Testimony of the signor of the reports, Hansen, was of the utmost importance to the proving of petitioner's case—all fully known to Chief Judge Knox at the time of the application.

Hence—the denial of the opportunity to produce Hansen was fatal to petitioner's cause of action.

Upon the application for the adjournment, the Court's attention was called to the fact that Hansen's absence at the trial would prove fatal to petitioner's cause of action (appendix 10a, 32a, 33a, 34a).

The statement by Chief Judge Knox that petitioner's counsel had neglected to take adequate steps to ascertain the whereabouts of the witness, Harry B. Hansen, and to obtain his testimony for the trial, is not supported by the record. The affidavits before Chief Judge Knox by Jacob Rassner, petitioner's counsel, establishes the absence of justification for the learned Court's ruling (appendix 3a-10a).

As to the circumstances of the original mistrial, we desire to point out that Jacob Rassner personally spoke to defendant's employee, Brooks, in charge of defendant's operations, who personally stated to Jacob Rassner that he would testify as to certain facts. Upon said witness appearing in Court, he was spoken to by Eugene Underwood, attorney for defendant-respondent, and thereupon

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Brooks reneged in his statement to Jacob Rassner, necessitating the motion for a mistrial.

The statement by Judge Edward Weinfeld, which obviously greatly influenced the decision of Judge Knox, was without justification. Judge Weinfeld's observation that the case was not properly prepared should be taken in the light of the fact that a witness reneged in his statement to Jacob Rassner.

The shortcoming of Jacob Rassner was in putting credence in the statement of Brooks and in not anticipating that Eugene Underwood would talk to Brooks in the courtroom just before Brooks took the stand, which conversation was followed by Brooks reneging in his previous statement.

It is true that Jacob Rassner should not have trusted Brooks and should have examined Brooks as a witness before trial and not relied upon his integrity to stand by his oral statement to Jacob Rassner.

Conclusion

The denial of the application for adjournment was tantamount to a denial to petitioner of her day in Court on the merits.

For the reasons set forth above, petitioner respectfully submits that this Honorable Court should issue its writ of certiorari to the United States Court of Appeals for the Second Circuit in this cause.

Respectfully submitted,

JACOB RASSNER,
Attorney for Petitioner.

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APPENDIX

First Illness Report

NORTH ATLANTIC & GULF STEAMSHIP COMPANY, INC.
120 Wall Street, New York 5, N. Y.

ILLNESS REPORT

NOTICE.—It is extremely important that the following questions be fully answered.
Patient should be questioned regarding details not known to person making report.

Name of Vessel Andrew Moore Flag American Voyage Number 18B

1.—The Patient

Name Robert L. Fairbairn
Address Bossert Hotel, Brooklyn, New York
Age 49 Nationality USA Married? Yes U. S. Citizen? Yes
Rating or capacity on vessel Master Where Born? England
Wages per month 616.00
Name and address of nearest relative or friend Wife, Irene, Bossert Hotel, Brooklyn, N. Y.

2.—The Illness

Date and hour illness first reported 0000—9/17/47
To whom reported Second Mate, Jessie James Shuck
Complaint and statement made by patient "Help—I'm Choking"

First Illness Report

Physical signs and/or symptoms pale in complexion, clammy TRR—946—no pulse—36—respiration in one hour had dropped to 12

3.—Treatment on Board and Final Disposition of Patient
Diagnosis **D. V.**
Describe in full all treatment given to patient on board vessel. There was no treatment given to patient aboard other than to keep him warm and lying down
By whom was patient treated on board vessel Purser
Was patient able to resume full duties on vessel No
Was patient sent to hospital on shore No
Had patient suffered similar illness before joining vessel Unknown

7.—Date on which voyage commenced 6/25/47

8.—From what port Baltimore, Md.

12.—Date on which patient was paid off 9/7/47

13.—Was substitute signed on Yes

14.—On what date 9/18/47

15.—Name of substitute Harry B. Hansen

16.—Name two prior employers of patient Unknown

17.—Remarks During the entire 2 hrs. & 55 min. pt. complained of choking up till the time he went into a coma. Once during the time he got out of bed and went into the head. Immediately afterwards he had a convulsion and bowel movements were continuous. Pt. died at 0255 9/17/47 was put ashore in Falmouth, Eng. PM was performed and immediate death put to "Virus Pneumonia". There were complications and no complete report was made. H. B. Hansen

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Second Illness Report

'acts

Name of Crew or Persons Who Know Fact
Concerning Illness and Treatment
on Board Vessel

Harry B. Hansen
Jessie J. Shuck
James A. Presnell
Charles A. Frey
Jay Gould

Second Illness Report

)MPANY, INC.

NORTH ATLANTIC & GULF STEAMSHIP COMP*. Y.
120 Wall Street, New York 5, N. Y.

ILLNESS REPORT

following ques-

NOTICE.—It is extremely important that the foll
tions be fully answered.
Patient should be questioned regardin
known to person making report.

rding details not

nerican Voyage

Name of Vessel Andrew Moore Flag Ameri
Number 18B

1.—The Patient

Name Fairbairn, Robert L.
Address Bossert Hotel, Brooklyn, N. Y
Age 49 Nationality English Married?
Citizen? Yes
Rating or capacity on vessel Master W
England
Wages per month 646.80
Name and address of nearest relativ
Wife, Irene, Bossert Hotel, Brooklyn,

N. Y.
ried? Yes U. S.
r Where Born?
lative or friend
klyn, N. Y.

Second Illness Report

2.—The Illness

Date and hour illness first reported 0005 GMT 9/17/47

To whom reported Second Mate—J. J. Shuck

Complaint and statement made by patient Called to bridge asking for help and saying he was choking

Physical signs and/or symptoms Cold clammy skin, Swelling and numbness of feet and ankles, and hands and arms, T-94.6—R. 36—P none obtainable

Diagnosis None given

3.—Treatment on Board and Final Disposition of Patient

Describe in full all treatment given to patient on board vessel Pt. was put to bed with hot water bottles applied to feet and hands. Several attempt were made to relieve possible congestion from throat

By whom was patient treated on board vessel Purser

Name and address of attending physican, if any none

Was patient able to resume full duties on vessel No

If patient was not sent to marine hospital, state reason The ship was two days from port at this time effort was made to return to port and land patient at hosp. but before this was possible pt. died.

Had patient suffered similar illness before joining vessel Unknown

4.—On what date did man Joined vessel on 6/10/47

6.—At what port Baltimore, Md.

7.—Date on which voyage commenced 9/25/47

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Second Illness Report

8.—From what port Baltimore, Md.

9.—Date on which voyage ended 3/10/47

10.—At what port New York

11.—Date on which crew was paid off for voyage 10/5/47

12.—Date on which patient was paid off 9/17/47 his wages ended

13.—Was substitute signed on Yes

14.—On what date 9/18/47

15.—Name of substitute Harry B. Hansen

17.—Remarks It was noticed by Mr. Hansen and by other officers on vessel that the late captain had considerable trouble walking and climbing ladders on the vessel. This was especially noticeable during the ship's stay in Rouen France. Other than his complaining of this condition there was nothing either noticeable or nothing else that he ever complained about. During the Autopsy in England a diagnosis was given to be Virus Pneumonia with complications, this was stated as being the actual cause of death

H. B. Hansen
(Signature of Master)

Jay Gould
(Signature of Officer)

Date 10/5/47

Name of Crew or Persons Who Know Facts Concerning Illness and Treatment on Board Vessel — Addresses

Jessie J. Shuck, Pinole, Calif.
Charles A. Frey, Albany, New York
James A. Presnell, Baltimore, Md.

Opinion of United States Court of Appeals for the Second Circuit

No. 136, October Term, 1954

Argued January 11, 1955 Decided January 25, 1955

Docket No. 23238

—o—

IRENE L. FAIRBAIRN, as Administratrix of the goods, chattels and credits of ROBERT L. FAIRBAIRN, deceased,
Plaintiff-Appellant,

vs.

NORTH ATLANTIC AND GULF STEAMSHIP COMPANY,
Defendant-Appellee.

—o—

Before CLARK, *Chief Judge*, and FRANK and HINCKS, *Circuit Judges*.

Appeal from the United States District Court for the Southern District of New York, John C. Knox and John F. X. McGohey, Judges.

Plaintiff-administratrix, appealing from a verdict and judgment for defendant in her action under the Jones Act, 46 U. S. C. § 688, to recover damages for the death of her intestate, has assigned as her sole claim of error the denial by Chief Judge Knox of her application for an adjournment of the trial.

JACOB RASSNER, New York City (LOUIS COHEN, New York City, on the brief), for plaintiff-appellant.

EUGENE UNDERWOOD, New York City (BURLINGHAM, HUPPER & KENNEDY and JAMES W. LYNCH, New York City, on the brief), for defendant-appellee.

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PER CURIAM.

Here the trial judges have shown assiduity to protect the plaintiff's legitimate interests when inexcusably neglected by the lawyer of her own choosing; but there comes a time when the court must refuse further continuances out of respect for its own dignity and the need to get judicial business done. Nor is there anything to show that the ensuing trial was unfair or the result improper.

Judgment affirmed.

Judgment

UNITED STATES COURT OF APPEALS

FOR THE SECOND CIRCUIT

At a Stated Term of the United States Court of Appeals, in and for the Second Circuit, held at the United States Courthouse in the City of New York, on the 25th day of January one thousand nine hundred and fifty-five.

Present:

HON. CHARLES E. CLARK,
Chief Judge,
HON. JEROME N. FRANK,
HON. CARROLL C. HINCKS,
Circuit Judges.

IRENE L. FAIRBAIRN, Administratrix,
Plaintiff-Appellant,

v.

NORTH ATLANTIC & GULF S.S. Co.,
Defendant-Appellee.

Appeal from the United States District Court for the Southern District of New York,

This cause came on to be heard on the transcript of record from the United States District Court for the Southern District of New York, and was argued by counsel.

ON CONSIDERATION WHEREOF, it is now hereby ordered, adjudged, and decreed that the judgment of said District Court be and it hereby is affirmed with costs to the appellee.

It is further ordered that a Mandate issue to the said District Court in accordance with this decree.

/s/ A. DANIEL FUSARO,
Clerk.

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